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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC. ET AL.,
Respondents.

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC. ET AL.,
Respondents.

BRIEF OF RESPONDENTS, DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC., ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

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Leslie H. Milam

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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The respondents, Don Marsh, W. E. Chilton, III, The Daily Gazette Company, a corporation, and Leslie H. Milam, respectfully pray that the writ sought herein be denied since the West Virginia Supreme Court of Appeals decided the question involved in accordance with the relevant requirements of the Constitution of the United States, the applicable decisions of this Court, and the Constitution of West Virginia.

OPINION BELOW

The opinion below and on which the Petition is based is set forth in the Appendix to the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the First Amendment to the Constitution of the United States and to the provisions of West Virginia Code § 49-7-3, both cited in the Petition, Article 3, § 7 of the Constitution of West Virginia provides as follows:

> "No law abridging the freedom of speech, or of the press, shall be passed; but the legislature may by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation."

QUESTION PRESENTED

In the view of these respondents, the question presented by the Petition is whether, in awarding a Writ of Prohibition against petitioners, the West Virginia Supreme Court of Appeals correctly applied federal constitutional principles in holding that the provisions of West Virginia Code § 49-7-3 violate the First Amendment to the Constitution of the United States as a prior restraint on freedom of the press, and corollarily, whether that statute violates the Constitution of West Virginia.

STATEMENT OF THE CASE

On February 9, 1978, a student at Hayes Junior High School, a part of the Kanawha County public educa-

tional system and located in St. Albans, West Virginia, was murdered, and another student at the school was arrested and charged with the murder. The next day, an article was published in The Charleston Gazette, a daily newspaper in Charleston, West Virginia, about the murder, and the names of the student murdered and the student charged with the murder were both mentioned. Both students were juveniles under West Virginia law, which prohibits the publication, only by newspapers, of the name of any juvenile in connection with criminal proceedings without a written court order.

Subsequently, these respondents were indicted by a Kanawha County Grand Jury for violation of the provisions of West Virginia Code § 49-7-3, and thereupon filed a writ of prohibition with the West Virginia Supreme Court of Appeals, which issued a rule in prohibition. On June 27, 1978, the Court held that the aforesaid provisions of the West Virginia statute were unconstitutional because they violated the First Amendment to the Constitution of the United States by creating a prior restraint on the freedom of the press.

ARGUMENT

The Provisions of West Virginia Code § 49-7-3 Abridge the Federal and State Right of Freedom of the Press by Imposing Upon the Press a Prior Restraint That Is Constitutionally Impermissible, Because the Interest Purportedly Sought to Be Protected by the Relevant Provisions of This Statute Is Not of Sufficient Magnitude to Justify the Imposition of Censorship of the Press.

The statute in question in this case clearly creates a prior restraint upon the freedom of the press as guaranteed by the First Amendment by requiring a court order before the name of a juvenile in a criminal pro-

ceeding may be published by a newspaper. Thus, the real issue is whether, despite the unqualified guarantee of the First Amendment, the statutory prohibition falls into any of the permissible exceptions developed by this Court in allowing imposition of prior restraints upon the press. These respondents submit that no such exceptions are applicable in this case and that the publication in question is protected under the First Amendment.

The exceptions are drastic and well-recognized. Prior restraints may be imposed in such extreme circumstances as to protect military information in time of war and in situations involving obscenity or incitements to violence or revolution by force. *Near* v. *Minnesota,* 283 U.S. 697 (1931); *Nebraska Press Association* v. *Stuart,* 427 U.S. 539 (1976).

Thus, while this Court has not granted absolute protection under the First Amendment in all circumstances, it has held that any system of prior restraint comes to the Court with a "heavy presumption" against its constitutional validity. *Nebraska Press Association* v. *Stuart, ibid.*

In the instant case, the effect of the statute compelling prior judicial approval before publication is akin to that in *Near* v. *Minnesota, supra,* where this Court held:

> "The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the Legislature to provide that, at

> any time, the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details), and required to produce proof of the truth of his publication, or of what he intended to publish and of his motives, or stand enjoined. If this can be done, the Legislature may provide machinery for determination in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be a step to a complete system of censorship."

Nor does the Constitution of West Virginia give the Legislature the authority or power to enact a statute of the kind in question here. Article 3, § 7 of the West Virginia Constitution clearly limits freedom of the press only in the areas of obscenity, libel, and defamation of character. Obviously, publication of a juvenile's name does not fit within any of these exceptions, none of which are obscure or arcane.

The statute clearly abridges freedom of the press; the type of speech that is restrained is not obscene, nor can, in this case, it be classified as libelous or defamatory since it is true, or at least undenied. Therefore, the Legislature has exceeded its clear, plain, and unambiguous constitutional power in enacting this statute.

The principles of constitutional construction support this obvious conclusion in the language of this Court in *Lake Country* v. *Rollins,* 130 U.S. 662 (1889):

> "To get the thoughts or meaning expressed in a Constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no ab-

> surdity nor any contradiction of the parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it."

It is respectfully submitted that the publication of the name of the fifteen year old juvenile in connection with his arrest for the killing of a classmate in a public school is necessarily a right guaranteed by the State Constitution, as well as the United States Constitution, a right to publish and a right of the public to know. No permissible inference from the carefully worded exceptions dealing with obscenity, libel, and defamation can be made to inhibit the press from publishing the name of the juvenile offender, as desirable as that objective might be in and under some circumstances.

We would respectfully invite the Court's attention that this constitutional provision was adopted by an intelligent and enlightened people who were fully cognizant of the dangers attendant to an inhibited and fettered press. Juveniles were surely among the living in 1863 when West Virginians adopted their Constitution and it can hardly be argued that criminal behavior of the adolescent is an aberration of recent vintage. No such exception was ever contemplated in 1863. And no dramatic changes have occurred affecting social intercourse and the juvenile that constrain reading such a limitation into this provision of either the State or Federal Constitutions.

By giving a governmental official, in this case a judge, the discretion and opportunity to grant or deny a newspaper the permission to publish a juvenile's name, the West Virginia Legislature has created a

classic prior restraint analogous to many which this Court has previously declared unconstitutional. Cf. *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546 (1975), and the cases cited therein.

One of the most important functions of a newspaper is to keep the public informed of events of public concern as immediately as possible—not days or weeks later. If a newspaper had to retain an attorney to petition a court to schedule a hearing to obtain an order approving publication of a juvenile's name every time a juvenile is arrested and charged with the commission of a felony in a public place—certainly a matter which the public in a given locality has the right and need to know—the value in the public's timely receiving this information would be lost—assuming the judge saw fit to grant the order. As Mr. Justice Douglas, concurring in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), stated, "there is no power on the part of government to suppress or penalize the publication of 'news of the day.' " Nor, these respondents contend, does government have the power, or right, to *delay* publication of the news of the day.

In the instant case, petitioners claim that the State of West Virginia has a valid and substantial interest in maintaining the anonymity of juvenile offenders sufficient to justify impairment of the First Amendment guarantee of freedom of the press; but the burden is on petitioners to establish the sufficiency of this interest because of the reverse presumption of constitutionality on the statute in question. *Southeastern Promotions, Ltd.* v. *Conrad, supra; Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58 (1963).

What constitutes a substantial enough interest for the Government to impose a limitation of this kind?

In *Dennis* v. *U.S.*, 341 U.S. 494 (1951), this Court had under consideration the attempt of several individuals, by means of publishing, to overthrow the United States Government in violation of a federal statute. This Court ruled that the individuals were properly and constitutionally convicted, notwithstanding the First Amendment protection extended to publishing, because their attempt, by publishing, constituted a clear and present danger to the Government. A greater governmental interest is difficult to imagine, yet the Court would not have found clear and present danger had the petitioners not intended the overthrow as speedily as circumstances would permit. Thus, the interest protected by the particular statute must be precious, and the potential damage to that interest very severe.

Similarly, in *Elrod* v. *Burns*, 427 U.S. 347 (1976), the Court held in favor of a county sheriff's employees whose jobs were being terminated because they were not affiliated with the Democratic party. The Court found that such a process was an infringement of the employees' First Amendment rights and stated:

> ". . . It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. * * * The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. * * * Moreover, it is not enough that the means chosen in furtherance of the interest be rationally related to that end. (citation) The gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights, . . ."

This Court has addressed itself to the interest that petitioners are attempting to establish in the instant

case. In *Oklahoma Publishing Co.* v. *District Court*, U.S. , 51 L.Ed. 2d 355 (1977), the Court held a prior restraint unconstitutional in a case involving an attempt by the State to keep confidential the identity of an eleven year old juvenile charged with second degree murder. The restraint in that case consisted of an injunction granted by the state court prohibiting news media from publishing the child's name. In its opinion, this Court considered the policy favoring the confidentiality sought by the State for juvenile offenders —the same policy asserted by petitioners in this case— and still held this interest not to be constitutionally sufficient. The rationale of the West Virginia Supreme Court of Appeals in its opinion, at page A-8 of the Appendix to the Petition herein, is relevant at this point:

> ". . . We see little distinction between that case [*Oklahoma Publishing*] and the one before us except that in West Virginia the prior restraint is achieved through a criminal statute while in the *Oklahoma Publishing* case it was achieved through a restraining order carrying the sanction of criminal contempt."

Finally, in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), this Court was faced with a statute which made unlawful the publication of the name of a rape victim. The Court weighed the free speech interest against the victim's right of privacy and held that the First Amendment right was the greater right, emphasizing the public's right to know:

> "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and conse-

quently fall within the responsibility of the press to report the operations of government."

The *Cox* case was decided on the ground that the public has a right to know the identity of the victim of a crime. How much greater then is the right of the public to know the identity of the perpetrator?

CONCLUSION

These respondents respectfully submit that the petition for a writ of certiorari should be denied since the statute in question clearly effects a prior restraint on the operation of a free press, and, as such, is subject to the heaviest presumption of unconstitutionality, which burden cannot be met since the interest sought to be protected is not of sufficient magnitude to justify such an invasion of First Amendment rights under either the Constitution of the United States or the Constitution of West Virginia.

Respectfully submitted,

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